

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FENEL BAINE,	§	
	§	No. 152, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0512011466
Appellee.	§	

Submitted: August 20, 2010  
Decided: November 18, 2010

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 18<sup>th</sup> day of November 2010, upon careful consideration of the briefs on appeal and the Superior Court record, it appears to the Court that:

(1) The appellant filed this appeal from the Superior Court's February 24, 2010 denial of his second motion for postconviction relief as without merit and/or procedurally barred under various subsections of Superior Court Criminal Rule 61(i).<sup>1</sup> We have determined that there is no merit to the appeal and, accordingly, affirm the judgment of the Superior Court.

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<sup>1</sup> See Del. Super. Ct. Crim. R. 61(i) (listing procedural bars to relief).

(2) On December 16, 2005, the appellant, Fenel Baine, and his friend, Keenan Bacon, were arrested and charged with the December 15, 2005 fatal shooting of Michael Cannon, and also with assaulting Michael Cannon's brother, Jeremy Cannon, and their friend, Marcus Johnson. Baine and Bacon each possessed a gun on the night in question. Baine's gun discharged as he was assaulting Jeremy Cannon with it. No one was struck by the bullet. Seconds later, Bacon's gun discharged. Michael Cannon was killed by the shot fired by Bacon.

(3) Under a pre-indictment plea agreement, Bacon pled guilty to manslaughter, the related charge of possession of a firearm during the commission of a felony (PFDCF), and third degree assault. Bacon was sentenced to a total of thirty years at Level V suspended after fifteen years for decreasing levels of supervision.<sup>2</sup>

(4) Baine was indicted on charges of manslaughter, assault in the second degree, assault in the third degree, conspiracy in the third degree, possession of a firearm by a person prohibited, and two counts of PFDCF. Baine was tried as a principal in the assaults of Marcus Johnson and Jeremy Cannon and as a principal or an accomplice in the death of Michael Cannon. Baine's first trial ended in a mistrial.

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<sup>2</sup> See *Bacon v. State*, 2007 WL 2570813 (Del. Supr.) (reciting terms of sentence when affirming the denial of a motion for correction of sentence).

(5) At the second trial, Baine’s trial counsel moved for acquittal of all charges on the basis of insufficient evidence. The Superior Court denied the motion, concluding that “there is ample evidence, in light [of] both direct evidence and inferences, to support the case going to the jury.”<sup>3</sup>

(6) The jury convicted Baine on all charges including manslaughter, but rejected the lesser-included charge of criminally negligent homicide. The Superior Court sentenced Baine to a total of ninety-one years at Level V followed by probation. On direct appeal, this Court affirmed Baine’s convictions and sentences.<sup>4</sup>

(7) In his first motion for postconviction relief, Baine alleged that: there was insufficient evidence to support the convictions, the trial judge gave an improper jury instruction on accomplice liability, and his trial counsel was ineffective. The Superior Court denied the motion on the basis that the insufficient evidence claim was procedurally barred and the accomplice liability and ineffective counsel claims were either conclusory or without merit. Baine filed appealed from the Superior Court’s decision; however, the appeal was dismissed as untimely.<sup>5</sup>

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<sup>3</sup> Trial tr. at 102 (Oct. 24, 2006).

<sup>4</sup> *Baine v. State*, 2007 WL 2372635 (Del. Supr.).

<sup>5</sup> *Baine v. State*, 2008 WL 5307386 (Del. Supr.).

(8) In his second motion for postconviction relief, Baine expanded his previously adjudicated claims. Also, Bain advanced two new claims that his indictment was defective, and that his due process rights were violated when he was not consulted before the Superior Court’s decision to declare a mistrial in his first trial.

(9) By order dated February 24, 2010, the Superior Court denied Baine’s second postconviction motion after concluding that all of the claims, except for a sentencing claim, were without merit and/or procedurally barred. The Superior Court did not directly address the sentencing claim. This appeal followed.

(10) On appeal, Baine argues that the Superior Court failed to properly instruct the jury to consider his “accountability for an aggravating fact or circumstance” when determining his individual culpability in the fatal shooting of Michael Cannon.<sup>6</sup> Baine’s claim is without merit. Having reviewed the jury instructions given by the Superior Court, we conclude that

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<sup>6</sup> See Del. Code Ann. tit. 11, § 274 (2007) (governing “offenses involving 2 or more persons; convictions for different degrees of offense”); *Allen v. State*, 970 A.2d 203, 214 (Del. 2009) (holding that when the State proceeds under an accomplice liability theory and a crime is divided into degrees based on differing mental states or on an aggravating fact or circumstance, § 274 requires that the jury make an individualized determination of the requisite mental state of the defendant and, where appropriate to the charge, the defendant’s accountability for the aggravating fact or circumstance).

the jury was properly instructed on Baine's criminal liability with respect to Michael Cannon's homicide.<sup>7</sup> Baine's claim was properly barred.

(11) Baine argues that there was insufficient evidence to convict him of manslaughter and the related charge of PFDCF because he did not know that Bacon had a gun.<sup>8</sup> That claim is procedurally barred as well. The Superior Court and this Court previously concluded that there was sufficient evidence from which the jury could find beyond a reasonable doubt that Baine knew that Bacon had a firearm, and that Baine recklessly caused the death of Michael Cannon.<sup>9</sup> Baine has not demonstrated that the claim warrants further consideration.

(12) Baine argues that he should have been consulted before the Superior Court declared a mistrial during his first jury trial. In support, Baine cites to Superior Court Criminal Rule 26.3, which provides that “[b]efore ordering a mistrial, the court shall provide an opportunity for the state and for each defendant to comment on the propriety of the order,

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<sup>7</sup> See *Guy v. State*, 999 A.2d 863, 872 (Del. 2010) (concluding that “[t]he individualized finding of a defendant’s particular mental state ensures that a defendant is convicted of the degree of homicide appropriately related to [the defendant’s] specific conduct.”).

<sup>8</sup> See Del. Code Ann. tit. 11, § 1447A (providing that a person who is in possession of a firearm during the commission of a felony is guilty of PFDCF).

<sup>9</sup> See Del. Code Ann. tit. 11, § 632(1) (providing that a person is guilty of manslaughter when the person recklessly causes the death of another person).

including whether each party consents or objects to a mistrial, and to suggest any alternatives.”<sup>10</sup>

(13) In this case, Baine’s trial counsel moved for a mistrial during an office conference because of issues involving a videotaped interview that was played for the jury.<sup>11</sup> Under these circumstances, Baine cannot show that he was excluded from “comment[ing] on the propriety of” a mistrial or that he was prejudiced. The Superior Court properly denied the claim as without merit and procedurally barred.

(14) Baine claims that his indictment was defective because it was not sufficiently specific. The Superior Court determined that the claim is without merit and procedurally barred. Having reviewed the indictment, we agree with that determination.

(15) Finally, we have considered Baine’s claim that his ninety-one year sentence “as an accomplice” is “cruel and unusual” as compared to the thirty-year sentence received by Bacon. We conclude that the claim is without merit and is procedurally barred.<sup>12</sup>

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<sup>10</sup> See Del. Super. Ct. Crim. R. 26.3 (governing “mistrial”).

<sup>11</sup> The record reflects that the videotape may have contained hearsay as well as the interviewing officer’s opinion or beliefs as to Baine’s guilt.

<sup>12</sup> On direct appeal we considered and rejected Baine’s claim that the trial judge exhibited a closed mind when imposing the sentence. *Baine v. State*, 2007 WL 2372635 (Del. Supr.).

(16) The record reflects that Baine's agenda to avenge a family member was the catalyst for the events that unfolded on the night of December 15, 2005.<sup>13</sup> Baine's violent mission began when he assaulted Marcus Johnson and continued when he assaulted Jeremy Cannon with a gun. Ultimately, the violence brought about by Baine resulted in the senseless fatal shooting of Cannon by Baine's cohort, Bacon. Under these circumstances and in view of the aggravating factors identified at sentencing, there was no error in the Superior Court imposing a sentence at the top of the statutory ranges.<sup>14</sup>

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice

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<sup>13</sup> Baine believed that his younger brother was "jumped" by Marcus Johnson and others several weeks earlier.

<sup>14</sup> See *Bryant v. State*, 2006 WL 1640177 (Del. Supr.) (concluding that defendant's sentence as compared to co-defendant's sentence did not constitute cruel and unusual punishment and was not otherwise constitutionally excessive).